No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. DOUGLAS WIKLE, Trustee in Bankruptcy, for NEVADA HENDERSON LAND CO., a corporation,

Appellant,

vs.

COUNTRY LIFE INSURANCE COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief of Appellees, Country Life Insurance Company and Title Insurance & Trust Co.

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Jurisdiction.

This is an appeal from the Order of March 8, 1967, made by the Honorable Pierson M. Hall, United States District Judge, Central District of California, affirming an order of the Referee in Bankruptcy which had dismissed on jurisdictional grounds a quiet title action brought by Appellant-trustee in bankruptcy [R. 489].[1] This court has appellate jurisdiction under Section 24a of the Bankruptcy Act, 11 U.S.C. § 47a.

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[1]All citations to the record ["R."] are to pages in the Transcript of Record in the Court of Appeals.

The Notice of Appeal is directed only to the District Judge's Order of March 8, 1967, but, curiously, Appellant's Opening

(This footnote is continued on the next page)

Statement of the Case.

On June 30, 1966, Appellant-trustee in bankruptcy filed his application in the bankruptcy court in Los Angeles to quiet title to certain real estate improved with a convalescent hospital facility and located in San Mateo County, California [R. 235]. Appellees Country Life Insurance Company. Sequoia Hospital District and Title Insurance & Trust Co. were named as respondents, as were several others not parties to this appeal, including First American Title Insurance and Trust Company.

Sequoia Hospital District was then in possession of and operating the hospital by virtue of a lease and option agreement made with Country Life Insurance Company on March 31, 1966 [R. 284, 295-296].

The three appellees and First American Title Insurance and Trust Company promptly objected to the summary jurisdiction of the bankruptcy court and moved to dismiss the trustee's application on that ground [R. 264, 294, 359]. Following a hearing at which all parties agreed to submit the jurisdictional matter on the pleadings, attached exhibits and the court's record,[2] the Referee ruled, by order dated Oc-

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Brief prays also for reversal of three orders of the Referee in Bankruptcy. (Op. Br. p. 40). One of the Referee's orders namely, that dated October 28, 1966, was affirmed by the order of the District Judge here appealed from. The other two, dated January 13, 1966 and March 3, 1966 respectively, were never reviewed and became final long ago. Appellant's attempt now to collaterally attack these orders is dealt with in the Argument portion of this brief.

[2]Appellant's Opening Brief states or implies that the trustee was deprived of an opportunity to introduce evidence. (*e.g.*, Op. Br. pp. 2, 9.) This is simply untrue. The Referee had specifically asked whether anyone desired to present testimony or other evidence, and all agreed to submit the case on the written record.

tober 28, 1966, that he lacked summary jurisdiction. Alternatively, he held that under the circumstances of this case, the court should decline to exercise such jurisdiction as a matter of discretion. The dismissal was without prejudice to the trustee's right to bring the quiet title action in an appropriate forum [R. 409-410].

Appellant filed a timely application to review this order [R. 411]. On March 8, 1967, Judge Hall affirmed [R. 484]. Notice of Appeal was filed March 21, 1967 [R. 489].

Statement of Facts.

On January 4, 1966, Nevada Henderson Land Co. commenced the bankruptcy proceeding by filing a plan of arrangement under Chapter XI of the Bankruptcy Act [R. 9].[3] It then owned the real estate which is the subject of the present quiet title action, consisting of a convalescent hospital facility in San Mateo County. The property was subject to various liens and encumbrances, including a first deed of trust held by Appellee Country Life Insurance Company to secure a loan of some $900,000.[4]

The Chapter XI proceeding was immediately referred to Referee in Bankruptcy John E. Bergener for administration. Bankruptcy Act § 22a, 11 U.S.C. § 45a. On the same day, January 4, 1966, upon the bankrupt's application, the Referee issued an *ex parte* order,

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[3]No actual petition under Chapter XI can be found in the record. See Referee's Certificate on Review [R. 3]. The petitions under Chapter X and in straight bankruptcy were filed subsequent to January 4, 1966 as set forth below.

[4]The trustee under this deed of trust was First American Title Insurance and Trust Company, erroneously referred to in the early pleadings in the bankruptcy court as "San Mateo Title Company."

returnable January 13, 1966, temporarily restraining Country Life Insurance Company from enforcing its security [R. 29]. Sale of the property under the power of sale contained in the deed of trust had been scheduled for January 5, 1966.

Timely objection to summary jurisdiction and opposition to the temporary restraining order was filed by Country Life Insurance Company on January 11, 1966 [R. 34].

On January 13, 1966, the bankrupt filed a voluntary petition in bankruptcy and the accompanying schedules [R. 40, 41-55]. Technically, therefore, the nature of the proceeding from that point forward was one of straight bankruptcy, except for the brief period a Chapter X petition was pending as referred to below.

At the hearing on the temporary restraining order on January 13, 1966, Country Life Insurance Company opposed further extension of the stay on the ground the bankruptcy court lacked summary jurisdiction. The argument was that on the date of bankruptcy, the real estate or subject matter of the controversy was in the possession of the Superior Court of San Mateo County by virtue of that court's appointment of a receiver on November 15, 1965 [R. 4].

The bankrupt did not attempt to offer evidence to justify continuance of the restraining order. Rather, counsel for the bankrupt advised the Referee that a Chapter X petition had just been filed [R. 4]. Accordingly, the Referee entered his order of January 13, 1966, declaring that the temporary restraining order of January 4, 1966 was dissolved and of no further force and effect [R. 62].

As noted, the bankrupt filed a petition under Chapter X of the Bankruptcy Act on January 13, 1966 [R. 64]. This petition was never approved under § 141 of Chapter X, 11 U.S.C. § 541. On the day it was filed, Country Life Insurance Company noticed a motion, to be heard by the District Judge, contending that the petition should be disapproved and dismissed on the ground of lack of good faith. Before the District Judge could rule on the issue thus raised, however, the bankrupt filed a withdrawal or dismissal of its Chapter X proceeding. The order of dismissal was signed by the District Judge on March 2, 1966 [R. 149].

Following the Referee's order of January 13, 1966 declaring the temporary restraining order dissolved, Country Life Insurance Company directed the trustee under its deed of trust, namely, First American Title Insurance and Trust Company, to sell the real estate on January 14, 1966 under the power of sale contained in the encumbrance. Such sale was in fact conducted, although the quiet title action subsequently brought by Appellant raises on the merits a question of whether alleged irregularities in the conduct of the sale by First American Title Insurance and Trust Company rendered it invalid or voidable. In any event, Country Life Insurance Company bid in the property at the sale on January 14, 1966. Thereafter, but prior to the delivery of the trustee's deed evidencing the sale, the bankrupt, on January 17, 1966, obtained from the District Judge in the then pending Chapter X proceeding an *ex parte* order restraining issuance of the deed [R. 84]. This restraining order was originally made returnable January 24, 1966, but the restraint was sub-

sequently continued by the Referee in Bankruptcy to February 1, 1966.

At no time after February 1, 1966 were any restraining orders or injunctions in effect. However, the bankrupt did apply for an additional stay [R. 143], and the request was continued from time to time on the Referee's calendar pending a ruling by the District Judge on the question of approval of the Chapter X petition.

On March 3, 1966, the final date to which the matter of the requested stay had thus been continued, a hearing was held before Referee in Bankruptcy Ray H. Kinnison, presiding in the absence of Referee Bergener. As stated before, the order of the District Judge dismissing the Chapter X proceeding was made March 2, 1966. Neither at the hearing on March 3, 1966 nor at any other time theretofore was evidence offered in support of restraining or enjoining enforcement of the deed of trust. After hearing argument, Referee Kinnison made an order dated March 3, 1966, declaring that all previous restraining orders had expired of their own force and permitting enforcement by Country Life Insurance Company of its security according to the terms thereof and California law, free of further restraint by the bankruptcy court [R. 150].

No review was ever taken from either the order of January 13, 1966 or the order of March 3, 1966.[5]

Following the order of March 3, 1966, First American Title Insurance and Trust Company delivered to Country Life Insurance Company the trustee's deed

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[5]Nevertheless, as referred to in note 1 *supra*, Appellant's Opening Brief now prays that these two orders, long since final, be reversed on the present appeal.

evidencing the sale under the power of sale. The document was promptly recorded on March 10, 1966 in San Mateo County [R. 249].

On or about March 31, 1966, Country Life Insurance Company leased the subject real estate to Appellee-Sequoia Hospital District and granted the lessee an option to purchase the property [R. 284]. Sequoia Hospital District has occupied the premises from and after the time of this lease transaction. In particular, it was in possession of the premises at the time Appellant instituted his quiet title action.

Questions Presented.

1. Whether the courts below erred in holding that the bankruptcy court had no summary jurisdiction, over timely objection, to determine the quiet title action brought by the trustee in bankruptcy.
2. Whether, assuming the existence of summary jurisdiction, the bankruptcy court on the facts of this case erred in declining to exercise jurisdiction as a discretionary matter.

Summary of Argument.

Summary jurisdiction of a bankruptcy court to determine controversies respecting property turns either on consent of the adverse party or on possession of the *res* or subject matter.

In the present case, there was no consent, timely objections to summary jurisdiction having been asserted at every opportunity. Nor was there possession of the real estate in question. At the time Appellant trustee in bankruptcy filed his quiet title application, Appellee Sequoia Hospital District was occupying the property. Moreover, even at the date of bankruptcy

the bankrupt did not have possession. Approximately six weeks before the petition, Appellee Country Life Insurance Company had brought suit in the Superior Court for San Mateo County in connection with enforcement of its first deed of trust, and a receiver was appointed. At the same time, the Superior Court enjoined the bankrupt from interfering with possession of the hospital. Thus, from the date of the Superior Court action to the present, either Country Life Insurance Company or the state court receiver or Sequoia Hospital District had possession of the *res,* and the bankruptcy court accordingly lacked jurisdiction.

Moreover, even if there was summary jurisdiction over the quiet title action, the bankruptcy court correctly declined to exercise it as a discretionary matter. The special circumstances justifying the refusal in this case are these: The entire bankruptcy proceeding of Nevada Henderson Land Co. has virtually no connection with the Central District of California, and involves only assets located in San Mateo County in the Northern District; the bankruptcy court in any event could not award complete relief among the parties; the trustee's quiet title action involves on the merits a question of state law as to which there apparently is no clearly governing authority; there appears to be no legitimate creditor interest in this bankruptcy proceeding; bankruptcy courts are well advised to remit the parties to a forum where jurisdiction is clear in cases of doubtful summary jurisdiction; and finally, no review was ever taken from earlier orders in which the bankruptcy court had refused to exercise jurisdiction over Country Life Insurance Company's trust deed enforcement.

ARGUMENT.

I.

The Bankruptcy Court Lacked Summary Jurisdiction to Determine Appellant's Quiet Title Action.

The Bankruptcy Court Had No Possession of the Res or Subject Matter of the Controversy.

Except for those cases where the adverse claimant consents, the bankruptcy court's jurisdiction depends on possession of the subject matter of the controversy.

> "And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy."
>
> *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481, 60 S. Ct. 628, 630 (1940).

Ordinarily, as noted, possession is tested for jurisdictional purposes as of the date of the petition. After the filing of the present bankruptcy proceeding, however, the Referee refused to enjoin enforcement of the deed of trust held by Country Life Insurance Company. Thus, the bankruptcy court permitted the sale to be conducted under the power of sale, and authorized possession of the property to be taken by appellees if they did not already have it. Under such circumstances, as will be discussed below, the possession of the *res* which would support reinvocation of summary jurisdiction must relate to the time of the filing of the quiet title action. As of this date, of course, all concede that claimants adverse to the trustee occupied the property.

But even assuming with Appellant that what happened in the bankruptcy court can be ignored and that

jurisdiction of the quiet title action can be established if the bankrupt had possession of the property at bankruptcy, there was no jurisdiction here. On November 15, 1965, about six weeks before bankruptcy, the Superior Court of San Mateo County appointed a receiver in an action brought by Appellee Country Life Insurance Company to enforce its deed of trust. A special application of the general rule respecting the bankruptcy court's summary jurisdiction involves the case where it or the bankrupt lacks possession at bankruptcy because a state court has first asserted its power with respect to the *res,* usually by appointing a receiver.

> *Straton v. New,* 283 U.S. 318, 51 S. Ct. 465 (1931);
>
> *Emil v. Hanley,* 318 U.S. 515, 516, 63 S. Ct. 687, 688 (1943).
>
> ("the state court appointed respondent receiver of the rents and profits of the apartment house.").

And see *Bryan v. Speakman,* 53 F. 2d 463, 465 (5th Cir., 1931):

> ". . . it has always been the law that the rule which operates to prevent unseemly conflicts between state and federal equity courts, that that which first acquires jurisdiction of a res retains possession of it. . . ."

The doctrine that prior appointment of a state court receiver precludes the bankruptcy court from exercising summary jurisdiction does not turn upon that receiver's actually having taken possession of the subject property.

What is crucial is the pendency of the prior state court action for the appointment of a receiver.

See:

1 Collier on Bankruptcy, pp. 333-335;

In re Greenlie-Halliday Co., 57 F. 2d 173 (2d Cir., 1932).

There is no merit to Appellant's position that the foregoing rule is inapplicable because the state court receiver appointed in the present case was one for rents only. In the first place, it should be noticed that the receiver involved in the leading case of *Emil v. Hanley*, cited above, was also a receiver only for rents and profits. Thus, it is a doubtful ground of distinction that the receiver's authority might be limited.

Secondly, in the present case it does not appear that the Superior Court for San Mateo County appointed a receiver for such a restricted purpose. The complaint of Country Life Insurance Company in the state court sought much broader relief [R. 268-273]. It requested enforcement of that provision of the deed of trust which enabled the beneficiary, upon default, to "enter upon and take possession of said property or any part thereof . . ." [R. 272]. The prayer included, among other things,

> "That plaintiff, its designated agent or a receiver appointed by this court upon plaintiff's application be allowed into possession of the real property in accordance with the terms of the deed of trust." [R. 273].

Contrary to the suggestion now made by Appellant, the order of the Superior Court dated November 15, 1965 did not merely authorize the receiver to collect rents. More broadly, it also provided:

> "IT IS HEREBY ORDERED that Wilbur B. Baptist be and he is hereby appointed, effective November 15, 1965, receiver of the real property described in plaintiff's complaint and plaintiff's application for appointment of receiver . . ." [R. 275].
>
> "IT IS FURTHER ORDERED that defendant Nevada Henderson Land Co. and its agents and attorneys be enjoined and restrained from collecting the rents from said premises and from interfering in any manner with the property and its possession." [R. 276].

In view of the foregoing, it certainly cannot be argued successfully that the bankrupt was in possession of the subject property at any time while the order of the Superior Court remained in effect. Thus, the fact crucial to the existence of summary jurisdiction as of the date of bankruptcy cannot be established.

That the case commenced as a proceeding under Chapter XI, as distinguished from one in straight bankruptcy, does not affect the question of jurisdiction. First, it is clear that a voluntary petition in bankruptcy had been filed by the debtor by January 13, 1966, the date of the first hearing on the restraining order [R. 40]. Appellant's present contention that this filing was inadvertent hardly changes the legal effect of the act.[6] Unless and until stricken or withdrawn, the vol-

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[6]Mr. Mathes' affidavit in support of Appellant's contention in this respect is somewhat surprising [R. 133]. In a colloquy with

untary petition resulted in an adjudication as a matter of law, Bankruptcy Act §18f, 11 U.S.C. §41f, thus converting the Chapter XI proceeding.[7]

In any event, this court has held that prior appointment of a state court receiver deprives the bankruptcy court of sumary jurisdiction in Chapter XI as well as in ordinary bankruptcy.

Smith v. Hill, 317 F. 2d 539 (9th Cir., 1963).

See also:

Carney v. Sanders, 381 F. 2d 300 (5th Cir., 1967).

There Was No Consent to Summary Jurisdiction.

Appellant's attempt to ground bankruptcy jurisdiction on consent or submission is wholly untenable. Country Life Insurance Company never consented to the summary jurisdiction of the bankruptcy court, either expressly or by implication. At all stages of the proceeding it made timely objections; its capacity was always that of a respondent who resisted the bankruptcy court's power to enjoin enforcement of the security or to determine the quiet title action [R. 34, 264].

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the Referee about the voluntary petition in bankruptcy during the hearing on March 3, 1966, Mr. Mathes did not indicate that there was any mistake in the filing of that document, although he certainly seemed cognizant of its legal effect. See Transcript of Hearing before Referee Kinnison on March 3, 1966, pp. 17 *et seq.*

[7]Moreover, while it does appear that at some stages of the case after January 13, 1966 the debtor might have thought it was still in Chapter XI, the record in this respect is somewhat equivocal. For the captions on various documents filed by Nevada Henderson Land Co. referred to the corporation as a "bankrupt," a designation which would be inconsistent with the status of "debtor" in a Chapter XI proceeding. [E.g., R. 79, 143].

Appellant's argument with respect to consent apparently is based on the fact that the Referee's order of March 3, 1966, declaring all previous restraining orders to have expired, authorized Country Life Insurance Company to enforce its deed of trust in accordance with the terms thereof and California law, free from further restraint by the bankruptcy court. Because counsel for Country Life Insurance Company drafted the order containing such a provision, Appellant contends that "affirmative relief" was requested and that this was tantamount to submission to bankruptcy jurisdiction for all purposes.[8]

Factually, of course, everything possible was done to avoid submitting, and Appellant's argument would seem to fall of its own weight upon analysis. Decisions of this court establish that unless restrained, a secured creditor, without express permission of the bankruptcy court, may validly proceed to enforce his deed of trust or other security even after bankruptcy.

Hardt v. Kirkpatrick, 91 F. 2d 875 (9th Cir., 1937);

Heffron v. Western Loan & Building Co., 84 F. 2d 301 (9th Cir., 1936);

Robinson v. Kay, 7 F. 2d 576 (9th Cir., 1925).

In Chapter XI, "A stay of an act or proceeding to enforce a lien, or of any suit, is not an automatic result of the filing of a petition proposing an arrangement. The granting or withholding of an injunction is left to the

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[8]Op. Br. pp. 30-33. Appellant does not, and could not, contend that appellees or First American Title Insurance and Trust Company consented in any way to summary jurisdiction over the quiet title action itself. As seen above, timely objections were filed by all [R. 264, 294, 359].

discretion of the court." 8 Collier on Bankruptcy Par. 3.20[3]. The same is true in straight bankruptcy

The rule, however, is different in Chapter XII, and in Chapter X after approval of the petition, where by specific statutory provision the enforcement of liens is automatically stayed. See Bankruptcy Act §§ 428, 148 11 U.S.C. §§ 828, 548.

Thus, in ordinary bankruptcy and Chapter XI the refusal or failure to enjoin a foreclosure and what Appellant calls the "affirmative relief" of permitting foreclosure are merely opposite sides of the same coin When a bankruptcy court declines to restrain enforcement of a security, it is at the same time permitting the enforcement to proceed outside the bankruptcy court. Since Country Life Insurance Company made actual and timely objection, Appellant cannot in any meaningful sense spell out a consent to jurisdiction from the semantics or form of the order of March 3 1966.

Moreover, consent to bankruptcy jurisdiction is not implied when a party appears before the referee only because he has no alternative. In *Glens Falls Insurance Co. v. Strom,* 198 F. Supp. 450, 458-459 (S.D. Calif., 1961), the court held that the filing of a reclamation application did not constitute a general submission if the secured claimant reserved his objection The creditor's sole alternative would have been to abandon the collateral. *A fortiori*, appearance for the purpose of resisting the continuance of a restraining order or seeking to be freed of it cannot be deemed a consent to jurisdiction.

Tamasha Town & Country Club v. McAlester Const. Fin. Corp., 252 F. Supp. 80, 87-88 (S.D. Calif., 1966).

Regardless of Whether the Bankruptcy Court Had Jurisdiction at the Date of Bankruptcy With Respect to the Subject Property, Jurisdiction Was Relinquished by the Court and Cannot Be Reasserted in the Quiet Title Action Over Objection of the Adverse Parties.

A. Although the bankrupt on various occasions asked the bankruptcy court to restrain enforcement of the deed of trust held by Country Life Insurance Company, the Referee ultimately declined to grant such relief and permitted the deed of trust to be enforced according to its terms. On January 13, 1966, the court entered its order declaring that a previous *ex parte* temporary restraining order was dissolved and of no further force and effect [R. 62]. Accordingly, on January 14, 1966, Country Life Insurance Company caused the foreclosure sale to be conducted under the power of sale contained in its deed of trust.

However, before the trustee under the deed of trust could deliver the instrument evidencing such sale, the bankrupt, on January 17, 1966, obtained another *ex parte* restraining order which enjoined delivery of the deed [R. 84]. This restraining order eventually expired by its own terms on February 1, 1966 and was never subsequently extended.

Thereafter, the bankrupt again applied for an order restraining delivery of the trustee's deed evidencing the sale under the power of sale [R. 143]. The application, upon which the court declined to issue an order to show cause, was continued on the calendar from time to time, finally coming on for hearing on March 3, 1966. Following the hearing, the court on the same date made its order declaring in effect that all restraining orders theretofore issued had expired of their

own force, that Country Life Insurance Company and the trustee under the deed of trust were free of any restraint by the bankruptcy court, and that they could proceed to consummate the enforcement of the deed of trust [R. 150].

Thereafter, in due course, the "Trustee's Deed Upon Sale" was delivered to Country Life Insurance Company, the successful bidder at the sale held on January 14, 1966 [R. 249]. On March 31, 1966, Country Life Insurance Company leased the subject premises to Sequoia Hospital District for a term of one year, and on the same date granted a one-year option to Sequoia Hospital District to purchase the subject real property for the sum of $1,070,000 [R. 284]. Sequoia Hospital District entered into possession of the premises on or about March 31, 1966 and has since been continuously in possession.

It thus appears clear that the bankruptcy court relinquished possession of the subject real property and relinquished summary jurisdiction, if indeed such possession or summary jurusdiction ever existed.

Even where a bankruptcy court possesses summary jurisdiction to determine a controversy at the inception of the bankruptcy proceeding, once possession of the *res* is relinquished or summary jurisdiction is surrendered the court's power cannot thereafter be reinvoked without the consent of the adverse claimant.

> "If the bankruptcy court voluntarily delivers property to a claimant, the possession of the court is lost, and the claim of the claimant becomes adverse, precluding the court from summarily determining the claimant's right to the property without his consent."
>
> 2 Collier on Bankruptcy, Par. 23.05[5], p. 491.

See also:

Hinds v. Moore, 134 Fed. 221 (6th Cir., 1905);

Cf. Tamasha Town & Country Club v. McAlester Const. Fin. Corp., 252 F. Supp. 80, 89 (S.D. Calif., 1966).

In this case, when the bankruptcy court refused to continue the restraining order, Country Life Insurance Company was free to enforce its encumbrance. Any possession of the property taken by Country Life Insurance Company or its successor following sale under the power of sale, constitutes an adverse possession for the purpose of summary jurisdiction over the quiet title action, regardless of who had possession theretofore.

B. As seen above, no review was ever taken from the orders of January 13, 1966 and March 3, 1966, as a result of which Country Life Insurance Company enforced its security. Apparently recognizing that these orders, if not set aside, amount to a relinquishment of jurisdiction, and that the time for review has long since expired, Appellant now attacks them collaterally on two grounds: First, he contends that they resulted from misrepresentations made to the court; and secondly, he asserts that they were ineffective because the receiver in bankruptcy was not a party to the proceedings on the restraining orders.

1. The alleged misrepresentations are said to concern the nature of the state court receivership and the intention of Country Life Insurance Company to enforce its deed of trust as soon as the restraining order was lifted. This argument is an unworthy one. In the first place, the Referee who was allegedly deceived has stated in his Certificate on Review that the contention "is without factual foundation." [R. 6].

Secondly, the actual order of the state court appointing the receiver was before the Referee on January 13, 1966 when he ruled that the restraining order should not be continued. Thus, it is difficult to understand how the court could have been misled as to the nature of the receivership.

Thirdly, it is hardly likely that the court could have misunderstood Country Life Insurance Company's intention with respect to prompt enforcement of its deed of trust. The obvious purpose in resisting the continuance of any restraining order issued by a referee is to enable the enjoined party to proceed with the enjoined conduct without further interference by the bankruptcy court.

Finally, as the Referee made clear in his Certificate on Review, the restraining order was not continued on January 13, 1966 because the bankrupt offered no evidence justifying a continuance [R. 4].[9] This ground was wholly independent of the jurisdictional argument made by Country Life Insurance Company in opposing the restraining order.

2. That the receiver in bankruptcy was not a party to the proceedings on the restraining orders is not crucial. Nothing which the bankruptcy court has determined in its order dismissing Appellant's quiet title action purports to bind the receiver or trustee on the merits of the controversy respecting the rights in the

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[9]Throughout Appellant's Opening Brief there seems to be a misconception respecting the burden of proof in restraining order matters. He argues that Country Life Insurance Company should not have been permitted to foreclose because it did not prove that there was no equity in the real estate. Obviously, however, the one seeking the restraining order or injunction must produce the evidence to support it [Cf. Fed. Rules of Civ. Proc., R. 65].

subject real estate. There has been no decision on the merits as to whether an equity exists in the property,[10] or whether the foreclosure under the power of sale and the deed evidencing it were valid or defective as a matter of California law. All that has been held in the proceeding below is that Appellant should attempt to enforce his rights in a plenary suit in an appropriate forum. Thus, Appellant's due process contention is without substance.

Appellant's argument that the receiver in bankruptcy was not made a party to the proceeding on the restraining order also ignores the fact that the receiver chose never to intervene, despite his appointment on January 6, 1966, nearly two months before the order of March 3, 1966 [R. 33]. It must be remembered that Country Life Insurance Company, as respondent, was resisting the bankruptcy court's jurisdiction and had no obligation to bring in additional parties. Indeed, it might have jeopardized its objection to jurisdiction if it had attempted to invoke the court's power over other persons.

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[10]Appellant's argument that there was a large equity in the property over and above the encumbrances possibly has relevance if he institutes a plenary suit, but it does not go to the question of whether summary jurisdiction exists with respect to the quiet title action. In any event, Appellant seems to have a tendency at the present time to overestimate the propery's value. In his own Application for Order to Show Cause Re Sale of Real Property, filed April 25, 1966, he indicated that a sale of the property for $1,200,000 would be reasonable if no higher bids were received at the hearing [R. 158]. But the total valid encumbrances as of the date of bankruptcy, according to Schedule A-2 of the bankrupt's schedules, was $1,272,000 plus interest. [R. 43]. Thus, only by a voluntary reduction of the claims of junior lienholders can Appellant spell out an equity. And the alleged offer to reduce the junior secured claims came only after they had been eliminated by the foreclosure under the senior trust deed held by Country Life Insurance Company. Moreover, even with the alleged vol-

II.

The Bankruptcy Court Did Not Err in Refusing as a Discretionary Matter to Exercise Summary Jurisdiction Over the Quiet Title Action.

That a bankruptcy court may properly decline to exercise summary jurisdiction even when it exists, directing the parties to litigate in another court as a matter of discretion, convenience, or comity, is a well recognized principle.

See, *e.g.*,

In re Terrace Lawn Memorial Gardens, 256 F. 2d 398 (9th Cir., 1958);

Glens Falls Insurance Co. v. Strom, 198 F. Supp. 450, 460 (S.D. Calif., 1961);

2 Collier on Bankruptcy, Par. 23.04[3], and cases cited at n. 44;

2 Collier on Bankruptcy, Par. 23.19, p. 634.

Any one of a number of special circumstances existing in the present case justify the refusal to exercise summary jurisdiction as a matter of discretion:

Bankruptcy Courts Properly May Decline to Decide a Case on the Merits When the Jurisdictional Question Is Close.

Where, as here, the existence of summary jurisdiction is doubtful, bankruptcy courts are well advised to avoid the jurisdictional problem and to remit the parties to another forum. The contrary course often leads to lengthy litigation on the merits and time con-

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untary reduction of the junior lien claims, there was no equity in the property if the price of $1,070,000, set forth in the purchase option granted to Sequoia Hospital District, be deemed to reflect the fair value of the real estate [R. 284, 285].

suming, costly appellate proceedings, with an eventual reversal on the technical jurisdictional ground and the need to start over again in an appropriate court. A recent case in point in the Ninth Circuit is *Suhl v. Bumb,* 348 F. 2d 869 (9th Cir., 1965).

In *Ford v. Magee,* 160 F. 2d 457, 460 (2d Cir., 1947), Judge Learned Hand admonished referees in bankruptcy not to make this mistake:

> "The result is one more illustration of what, one would suppose, had been proved often enough already: i.e., that it is almost a mistake to seek a conclusion in situations of this sort by the short cut of a summary proceeding. Time and money are spent, the controversy remains undecided, the administration of the estate is delayed and further prosecution of the claim is chilled. . . . [N]ot much time would have been gained, even if the proceeding had succeeded; and now that it has failed, all must be begun again, or the claim must be abandoned. *We cannot too insistently urge upon trustees not to proceed in this way; we cannot too seriously impress upon referees the duty of discouraging in every way possible those trustees who do so proceed.*" (Emphasis added).

The Bankruptcy Court Could Not Have Awarded Complete Relief Among the Parties.

There are several respondents named in Appellant's quiet title action, but their rights among themselves can be determined only in an appropriate plenary suit. For example, if respondent First American Title Insurance and Trust Company, the trustee under the deed of trust, conducted an improper sale under the power

of sale and thus prejudiced the beneficiary, respondent Country Life Insurance Company, the latter might well have a claim for damages against the former. The bankruptcy court, of course, could not award such relief. Similarly, if the title acquired by Country Life Insurance Company as a result of the sale was defective, it might be liable to respondent Sequoia Hospital District to which it granted an option to purchase. Again, the bankruptcy court could not adjust the rights between these parties. Moreover, since the only possible cause of action the trustee in bankruptcy has against respondent First American Title Insurance and Trust Company and respondent Title Insurance & Trust Co. is *in personam,* a judgment on such claim could be obtained only in a plenary suit absent consent of the adverse parties. *Cf. Suhl v. Bumb,* 348 F. 2d 869 (9th Cir., 1965).[11]

Under these circumstances, the Referee rightfully concluded that fairness required the case to be heard by a court which could fully grant the appropriate relief and adjust all of the rights among the litigants.

A Bankruptcy Court in Los Angeles Is Not the Most Appropriate Venue for an Action to Determine Rights in Land in San Mateo County.

The real estate in question is a hospital facility situated in San Mateo County. A court sitting in that county would thus seem to be the proper venue for Appellant's quiet title action. Certainly it was not an abuse of discretion for the bankruptcy court so to conclude.

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[11]On March 13, 1967, Appellant dismissed First American Title Insurance and Trust Company from the quiet title action [R. 487]. Thus, this respondent is not an appellee here.

In passing, it might be noted that the entire bankruptcy proceeding of Nevada Henderson Land Co. has little connection with the Central District of California. The bankrupt is a Nevada corporation. It had no assets within the Central District [R. 48-55], and although it represented its business address as Beverly Hills [R. 40], the statement is questionable in that the corporation's sole business activity concerned the hospital in San Mateo County.

No Review Was Ever Taken From the Orders of January 13, 1966 and March 3, 1966.

Earlier it was demonstrated that the bankruptcy court's orders of January 13, 1966 and March 3, 1966, refusing to enjoin enforcement of the Country Life Insurance Company deed of trust, amounted to a complete relinquishment of any previously existing summary jurisdiction over the real estate in question. Such jurisdiction could not be reinvoked without consent of the adverse parties. But even if this was not so, neither of the two orders was ever reviewed, nor was there any attempt to have them vacated. In reliance on the fact that the bankruptcy court had refused to stay the foreclosure proceeding, the sale under the deed of trust was conducted, the property was bid in, the deed was delivered and recorded, a lease and option agreement was executed, and Appellee Sequoia Hospital District operated the premises for several months before Appellant commenced the quiet title action and made his collateral attack on the two orders. Under these circumstances, the bankruptcy court quite understandably declined at such late date to reassert summary jurisdiction if any existed.

Appellant's Quiet Title Action Raises on the Merits an Unsettled Question of Local Law.

On the merits, Appellant's quiet title action relies on alleged irregularities in the conduct of the sale under the power of sale contained in the Country Life Insurance Company deed of trust. This contention, particularly the effect, if any, of the unusual recitations in the deed evidencing the sale, raises a question of California property law as to which there apparently is no clearly governing authority. The bankruptcy court properly may abstain from deciding an issue under these conditions since the state forum is the only one with the power to declare the rule of property law authoritatively.

Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S. Ct. 628 (1940).

There Seems to Be No Legitimate Creditor Interest in the Nevada Henderson Co. Bankruptcy Proceeding.

There is yet another persuasive reason why the bankruptcy court should abstain from hearing the merits of the quiet title action, namely, that it is extremely doubtful there is any legitimate, unsecured creditor interest in the bankruptcy proceeding at all. The original schedules indicate virtually no unsecured creditors other than a former stockholder [R. 44].[12] And although the six-month period for filing claims under Section 57n of the Bankruptcy Act, 11 U.S.C. §93n, expired

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[12]On June 30, 1966, about six months after filing the original schedules, the bankrupt sought and was granted leave to amend the schedules to add three relatively minor creditors [R. 253-255]. None of these, however, filed an actual claim within the time permitted by law. Interestingly, the amendment to the schedules and Appellant's quiet title action were filed the same day.

September 29, 1966,[13] only one claim has been filed in the case [R. 443]. That sole claim, made by the bankrupt's former stockholder, apparently represents the price the corporation agreed to pay for a repurchase of its own shares, a debt of questionable validity on its face [R. 442].

Conclusion.

For the foregoing reasons, the Order of the Honorable Pierson M. Hall, United States District Judge, dated March 8, 1967, should be affirmed.

Respectfully submitted,

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A. J. GILBERT,
By GEORGE M. TREISTER,
Attorneys for Appellees Country Life Insurance Company and Title Insurance & Trust Co.

[13]The first meeting of creditors was March 29, 1966.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George M. Treister